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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1122

FRED A. BROWN AND JENNIE B. BROWN, doing business as GEM DAIRY, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, and ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, *Respondents.*

PETITION FOR CERTIORARI
(With Appendices)

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PETITION FOR CERTIORARI (With Appendices)

THE OPINIONS BELOW:

The within proceeding is rather complex as to the number and type of proceedings below:

1. There was commenced in the United States District Court for the District of Colorado an action by the United States, as Plaintiff, against Fred A. Brown and Jennie B. Brown, doing business as Gem Dairy, Defendants. That action was primarily injunctive in nature, seeking to require the Browns to comply with terms and provisions of the Agricultural Marketing Agreement Act of

1937, as amended, 7 U.S.C.A., #601 et seq., as amended. Preliminary injunctive relief was sought, and summary judgment was sought, requiring the final determination of the matter, upon the motions of the Government, without further or any trial. That relief was denied by the District Court, in two opinions, reported as *United States vs. Brown,* 211 F.Supp. 953 and 217 F.Supp. 285, printed as Appendix A and A-1, respectively.

2. From that decision of the United States District Court denying preliminary injunctive relief, the United States appealed, its Appeal being No. 7433, before the United States Court of Appeals (10th Circuit), heard at the April Term, 1964.

2.1 During the course of the appeal, the United States endeavored to dismiss its appeal, which attempt to dismiss was resisted, the matter being then at issue. On April 29, 1964, the Circuit Court, Judges Breitenstein, Hill, and Kerr, issued a per curiam opinion, denying that dismissal.

2.2. On the same date, the same Court rendered an Opinion, affirming the District Court.

These opinions of the Circuit Court constitute *United States vs. Brown,* 331 F.2d 362, printed as Appendix B-1.

3. As will be noted in the District Court opinion above referred (211 F.Supp. 953), it was suggested that certain factual determinations be essayed in administrative proceedings, inasmuch as no administrative hearings had taken place prior to institution by the United States of initial action involved in the United States District Court. Accordingly, while action was pending in the United States District Court, and upon the suggestion of that Court, the Browns instituted a proceeding before the

Secretary of Agriculture in pursuance of Title 7, Section 608 (c)(15), U.S.C.A., which proceedings became Department of Agriculture AMA No. M 137-1, there being entered what purported to be a final order in that proceeding in Agricultural Decisions, Volume 23, No. 1. That decision is *not shown in an appendix here,* because it is included, as provided by Rule 23 (i) of this Court, in the record prepared for the Court below at page 29 and following.

4. There was subsequently filed, in pursuance of the statute, in the United States District Court for the District of Colorado, an action, No. 8511, by the Browns against the United States and Orville Freeman, Secretary of Agriculture, to review the purported final decision in that administrative proceeding, AMA No. M 137-1, which action in the United States District Court was consolidated with the already pending No. 7549 in that Court, as also suggested by the Court in 211 F.Supp. 953.

5. The Trial Court, that is, the United States District Court entered an order found at page 75 of the Record, and so not reprinted here as an appendix, in pursuance of the provision of Rule 23(i). No evidence of any kind justifying an injunction was sought to be presented or was presented before the Trial Court. The Trial Court did enter a monetary judgment, and specifically found as follows:

> "Judgment is entered in favor of the United States for payment to the Market Administrator for and on behalf of the producer-settlement fund pursuant to the provisions of Milk Order No. 137 for the sum of $13,066.39 owing for milk handled by defendants during the months of November, 1961, through and including March 31, 1963. *The injunctive relief requested*

by the United States is denied, no evidence justifying the same having been presented to the Court.'' (Emphasis supplied).

6. Cross-Appeals were filed to the United States Court of Appeals, Tenth Circuit, being Nos. 8291 and 8292, consolidated, in that Court. An Opinion of the Court was rendered on October 27, 1966, by the Court, reported in 367 Fed. 2d 907, and appended hereto as Appendix C. That matter was heard by Judges Pickett, Hickey, and Christensen, a bench different in all personnel from the bench which had heard and rendered opinion reported in 331 F.2d 362. The opinion is entirely at variance with the opinion in 331 F.2d 362, though by the same Court. Petition for Rehearing En Banc was filed in pursuance of the Rule, and that petition was denied, without opinion, on December 6, 1966.

7. Mandate was sent to the District Court on December 19, 1966.

STATEMENT OF GROUNDS OF JURISDICTION:

The Opinion of the Circuit Court in Nos. 8291-2 was rendered October 27, 1966, and filed on that date with the Clerk of the Court, who entered the same on his docket. On November 16, 1966, there was filed a request for extension of time for filing of a Petition For Rehearing en banc, as per the rules of the Circuit Court, which request was granted, continuing the time to Monday, November 21, 1966, at which time the Petition for Rehearing en banc was filed on behalf of the Browns.

Petition for Rehearing was denied on December 6, 1966, and the denial was on that date entered by the Clerk in his docket, and mandate was returned to the District Court for the District of Colorado on December 19, 1966.

Entry of Judgment or decree sought to be reviewed is accordingly, and is here considered to be, December 6, 1966. There has been no further request for rehearing, and there has been no request for or order granting extension of time within which to petition for certiorari, the 90-day period running from December 6, 1966.

Jurisdiction is conferred upon this Court, the Supreme Court of the United States, to review the judgment or decree in question by certiorari by Title 28 U.S.C.A., #1254 (1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • • "

Time is governed by Title 28 U.S.C.A., #2101(c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. • • • "

THE QUESTIONS PRESENTED FOR REVIEW:

The questions here presented for review, expressed in the terms and circumstances of the case, are essentially as set forth in paragraphs 1 through 4.2 below; and the Petitioners assert and believe and submit that jurisdiction of this Court upon certiorari exists, within the contemplation of Rule 19 of this Court, for each of the following reasons and upon each of the following grounds:

1. The Circuit Court for the Tenth Circuit, in its

opinion in Nos. 8291-2 (367 F.2d 907), last decided, has rendered a decision which is wholly conflicting with the decision of three other judges of the same Court (331 F. 2d 362) in the same basic action. Resolution of this problem within the Circuit was possible only by rehearing en banc, sought by motion appropriately and timely filed. Under existing rules of the Circuit, however, that motion could only be considered favorably by a concurrence of one of the three judges last acting, absent which concurrence there could be no rehearing, and hence there could be no resolution by the Court en banc. Inasmuch as each Court was unanimous and each consisted of two Circuit and one District Court Judges, and inasmuch as the personnel is entirely different in the two Courts, the situation presents an irreconcilable difficulty.

2. The same Court, in the same case, has accordingly decided differently an important and vital question of Federal Law, which should be resolved by this Court. Each Court has dealt with 7 U.S.C.A. #608a(6), providing:

> "The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

The United States has argued that The Supreme Court of the United States in *United States vs. Ruzicka,* 329 U.S. 287, has interpreted that statute, 7 U.S.C.A. #608a(6), to mean that, an administrative order having issued under a Milk Order, the United States District Court may make no independent inquiry as to the facts,

but must enforce the administrative order by the equitable sanction of injunction.

Such was the contention of the United States in its unsuccessful appeal in 331 F.2d 362, rejected by the Circuit Court, which specifically held that the Trial Court had independent right of determination as to whether or not the equitable remedy was to be applied.

Precisely the reverse determination is made in the later decision, by different judges of the same Court, in 367 F.2d 907.

3. Moreover, the Circuit Court for the Tenth Circuit, insofar as concerns the rendition of the second mentioned decision, has so far departed from accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. Attempting to negate the opinion of other judges of the same Court, it is asserted by the Court last writing, as a footnote to its opinion, and on page 11 thereof: "The case is no longer in the situation as when it was previously before this court. Gem has since been found to be in continuous violation of the order. See, *United States vs. Brown,* 10 Cir., 331 F.2d 362."

In fact, Gem is neither more nor less in violation at the time of the second than of the first case, *for the appeals are in the same case,* which is one action purposed to determine whether there was any jurisdiction over Gem at all. It has not defied or violated any findings of jurisdiction, but has from the incipiency of the proceedings contested the fact that it was within the purview of the milk orders. It has filed all reports, as fully admitted, from the beginning of the Order and with non-waiver endorsement. The matter has been one in which Gem has

persistently contended that it is not a handler subject to jurisdiction of the Act or Order, and THERE HAS BEEN AT NO TIME AN ADJUDICATION THAT GEM HAS BEEN IN CONTINUAL VIOLATION. Contrarily, the Trial Court entered a memorandum opinion and order (Record, page 67 and following, entered October 27, 1964). On February 15, 1965, the United States petitioned for leave to file a supplemental complaint (Record page 74), and on February 26, 1965, the United States requested leave to withdraw its supplemental complaint (Record 74), which leave was granted and the supplemental complaint withdrawn the same day. No further relief was either asked or obtained by the United States, and apparently was not needed. Not only did the Trial Court not adjudge that Gem was in "continual violation" as alleged by the footnote, but contrarily the Court found (Record 75):

> "THE INJUNCTIVE RELIEF REQUESTED BY THE UNITED STATES IS DENIED, *NO EVIDENCE JUSTIFYING THE SAME HAVING BEEN PRESENTED TO THE COURT.*"

This is an incontestible finding, since no word of evidence in support of an injunction appears upon the record.

3. There is involved fundamental and important question of law which has not been and should be clearly decided by this Court. The statute, 7 U.S.C.A. #608(a)(6) grants to the United States district courts jurisdiction specifically to enforce and prevent and restrain any person from violating any order, regulation, or agreement under the Agricultural Act. It is contended by the Browns that this is nothing more than the definition of an occasion on which the United States District Court *may*, in the exercise of its equitable discretion, grant equitable relief. The United States contends that, there being an adminis-

trative order, the Court *must* enforce by equitable means, and may not limit its enforcement to monetary judgment, or otherwise exercise its discretion.

It is contended that such is the meaning of the decision in this Court in *United States vs. Ruzicka,* 329 U.S. 287. The same argument as to the effect of that case was made before the Tenth Circuit in 331 F.2d 362 and in 367 F.2d 907. Diametrically opposite results are reached by two sets of three federal judges of the same circuit in the same case.

If the meaning contended for by the United States is allowed, it is the allowance, we most respectfully submit, of a complete invasion of the power of the judiciary by the legislature, and is a fundamental subversion of the fundamental constitutional doctrine of separation of powers. While it is permissible for the legislature to define an *occasion on which* the equitable powers of the judiciary are to be exercised, and even to permit enforcement of administrative orders by supplemental judicial proceedings, it is not open to the legislature mandatorily to determine that in each such defined case the Courts must or shall grant equitable relief. That latter function is taking on to the legislature the very judicial power, which is to determine, case by case, and as a matter of independent judicial determination and discretion, whether injunctive or other equitable relief issues or not.

3.1. Moreover, when the Trial Court, which is the trier of the facts, has categorically found that "the injunctive relief requested by the United States is denied, NO EVIDENCE JUSTIFYING THE SAME HAVING BEEN PRESENTED TO THE COURT", the second group of judges of the Circuit Court, rendering an opinion in contrariety to a group of their brothers, have usurped

entirely the function of the lower Court in ordering an injunction, upon a statement not appearing in the record and contrary to all findings therein, namely that "Gem has since been found to be in continual violation of the order", the Trial Court not making that finding, and no one else being possessed of jurisdiction to make it.

4. The Circuit Court has, moreover, decided a very important federal question, or set of such questions, in a manner which conflicts with applicable decisions of this Court, in two particular areas:

4.1. The within action involves the theory of the "settlement fund" and the principle and theory of "pool milk" under milk order, concepts which involve inherent violation of constitutional principle when, as here, the orders which embody those principles seek to operate to exclude non-pool milk from the market or to penalize the entry onto the market of non-pool milk. The Brown milk in any constitutional sense is non-pool milk, derived from five limited herds, involving ownership of the Browns, excluded from participation as producers in distribution from the producers settlement fund, and yet forced confiscatorily to contribute to that fund in order to subsidize pool milk, all direcly in violation of the principles clearly announced by this Court in *Lehigh Valley Cooperative Farmers, Inc. et al. vs. U. S.*, 370 U.S. 76, 82 S. Ct. 1168 (June 4, 1962).

4.2. The Department of Agriculture has throughout these proceedings denied to the Browns the very fundamentals of due process, by an administrative "determination", without notice, hearing, or evidence that they were "handlers", by a denial of the statutory right of administrative appeal and review; and by refusal to hear or

to render an opinion or to perform a mandatory duty prescribed by statute, all directly in violation of procedural requirements set forth by this Court with relation to that very Department and Secretary in *Morgan vs. United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, and in *Morgan vs. United States,* 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129.

Constitutional principles involved are those inherently involving procedural and substantive due process under the federal constitution, as relating to federal agencies; while there is also basically involved, as adverted above, the underlying constitutional principle and theory of separation of powers.

Statutes and regulations involved, including those mentioned specifically above, including the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C.A. 601, et seq., set forth as to its pertinent parts in Appendix D-1 below, and Federal Milk Marketing Order No. 137 regulating handling of Milk in the Eastern Colorado Marketing Area, 26 F.R. 9122, as amended, 7 C.F.R. 1137.1 et seq., set forth in its pertinent portions in Appendix D-2 below.

CONCISE STATEMENT OF THE CASE:

Fred and Jennie Brown are husband and wife and co-partners doing business as Gem Dairy at 5300 Vallejo Street, Denver, Colorado, where they live. They conduct a small, family-operated dairy business, primarily dealing in home-delivery of dairy products. They have always derived their milk supply from some six (later reduced to five) small herds of cattle. In May, 1961, many months before adoption of the Milk Order or its effective date, the Browns entered into six Agreements (Record, page

104), under each of which they purchased for money actually paid interests in the herds, and became the absolute owners of all milk produced by those herds. Substantially all of their milk is derived from those herds. The Browns contend and have always contended that their milk is not and never was "pool milk"; that it is not purchased by them and is not subject to an equalization payment; and that they are producer-handlers not subject to the Milk Order.

That contention has been made by the Browns from November, 1961, the date of the Milk Order, onward. Before the Order became effective, the Browns advised the Administrator that they would not consider themselves subject to it, and were not handlers within it. They have always made complete reports, with a restrictive endorsement indicating that they did not acquiesce in a handler's status. They have paid certain sums on account of administration of the fund. They have declined to pay into the "producers settlement fund", and it is agreed by everyone that neither they nor any co-owner of their herds has been allowed or ever will be allowed so long as the arrangements existing continue the right to any withdrawal from the fund as a "producer".

There was admittedly never an administrative hearing of any kind given the Browns to determine whether they were "handlers" or within coverage of the fund. There was never any administrative or other hearing to determine what sums might be claimed against the Browns by way of contribution to the "producers settlement fund".

Contrarily, there was instituted an action in the United States District Court against the Browns, in which the Administrator simply asserted that he had "deter-

mined'' that they were subject to the Order and the obligation to make payment; that he had ''determined'' the amount they were required to pay; and demanding injunctive relief in summary fashion. Objection was made by way of Answer upon constitutional grounds, alleging inter alia the absence of any notice, hearing, or other fundamental procedural prerequisite in the matter, denying coverage by the Order, and denying obligation.

Summary judgment was sought in the Trial Court and denied in the opinions referred to in 211 F.Supp. 953 and 217 F.Supp. 285, Appendix A and A-1.

The government contended that, having, albeit without notice, hearing, or other procedure or process, ''determined'' administratively coverage of the Browns (it being shown that the persons who made the ''determination'' were employees of the Milk Marketing Division who themselves had not held hearings, or advised the Browns of any or permitted them to be present at any, but who simply reported to the Administrator, who without knowledge or evidence made the ''determination'' upon such nonspecific and unrecorded report) the Court was required to grant *injunctive* relief.

It was contended by the government that the duty to grant injunctive relief was mandatory upon the Court, that it could not make inquiry into the amount owing, it being sought to claim that the provisions of 7 U.S.C.A. #608(a)(6) create a mandatory duty upon the Court to grant the government equitable relief, preliminary and final, simply upon assertion of its administrative determination of a right thereto.

The Trial Court declined that position, holding that the Court performed a judicial function, and had the duty

of independent inquiry and determination. The Court suggested that, there having obviously been no administrative proceeding at all, one be instituted by the Browns under 7 U.S.C.A. 608(c)(15)(A), and, while the Federal Court proceeding was going forward, such a procedure was in fact instituted as referred above, and the Browns, pursuant to Court instruction in 211 F.Supp. 953, making all required reports pending all proceedings.

Concurrently, the United States appealed the orders of the District Court to the Circuit Court, and after the matter was at issue, sought to dismiss its appeals. The Circuit Court in the per curiam opinion adverted above and in the opinion adverted above resolved first to retain jurisdiction of the appeal, and secondly sustained the District Court, holding the functions to be indeed judicial and subject to the discretion of the trial court and in no manner mandatory.

There was held a hearing before a hearing officer in the administrative proceeding. Upon the record of that hearing there was adduced none of the evidence which was necessary to determine the amounts claimed to be owing by the Browns. It was admitted that, from the record, produced in that administrative hearing, it was impossible for anyone to calculate the sums claimed to be payable by the Browns into the producers settlement fund. The Milk Market Administrator, Dr. Luke, was examined in full on that point (Record, page 162 and following). There were produced a number of accounting forms. On each of the forms one or more critical data were and were admitted to be absent. It was stated that some of these might be obtained from a "bulletin". That bulletin was never placed in the record, nor is there any reference any place in the record to any of the missing data which are

supposed to be contained within it. Accordingly, the record is admittedly deficient in forming the basis for any calculation of obligation.

Over objections of the Browns properly set forth in Brief form and other administrative submittals, the hearing officer made a report simply parroting the argument of the Milk Administrator, and ignoring entirely the deficiency of the record. The statute provides for a hearing and a ruling by the Secretary of Agriculture. No one else is given authority in the premises. The Browns insisted upon such a ruling, and appealed to the Secretary of Agriculture. They caused counsel to journey to Washington for presentation to the Secretary, but were allowed presentation only to a "Judicial Officer", Mr. Flavin. Argument was to him, and opinion was rendered by him and in his own name, not even purporting to act for the Secretary. The procedure was objected to, it being objected that the statute, 7 U.S.C.A. 608(c)(15)(A) provides for action by the Secretary of Agriculture and no other:

> "Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such a petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. AFTER SUCH HEARING, *THE SECRETARY SHALL MAKE A RULING* UPON THE PRAYER OF SUCH PETITION WHICH SHALL BE FINAL, IF IN ACCORDANCE WITH LAW."

The Secretary never did make a ruling, and refused to make one. The Judicial Officer in his own name did make a ruling and had no power to make one. Numerous and timely objections were filed. They were ignored, and finally returned by the judicial officer, who refused to permit them in the file, though they are part of the record of the Court.

Thereafter, there was filed in pursuance of 7 U.S.C.A. 608(c)(15)(B), in the District Court of the United States for the District of Colorado, an action as provided by that statute for the review of this erroneous ruling. As referred above, that action was consolidated with the already and continually pending original action by the United States against the Browns.

The Trial Court thereafter held several hearings, which were essentially legally arguments, substantially no testimony of any kind being taken. The Trial Court prepared a memorandum opinion and order (contained in the Record, page 67 and following), entering the same on October 27, 1964. Thereafter, on February 15, 1965, the United States sought leave to file a supplemental complaint (page 74), and was granted that leave. On February 26, 1965, the United States requested permission to withdraw its supplemental complaint, and that was granted. There was at no time any other or different judicial proceeding. The substantive problem of the status of the Browns was at all times before the Court in the original proceeding. The Trial Court sustained the monetary award against the Browns, but it found that there was no basis for any injunctive relief against them, that there was no evidence in the record justifying any injunctive relief, as indeed there was not, and declined to grant any. Again the United States insisted that the Court was

without discretion, and that injunctive relief was mandatory, arguing directly against the previous determination by the Circuit Court.

The trial court was very explicit in its findings relative to injunction: "THE INJUNCTIVE RELIEF REQUESTED BY THE UNITED STATES IS DENIED, *NO EVIDENCE JUSTIFYING THE SAME HAVING BEEN PRESENTED TO THE COURT.*"

Cross appeals as indicated above were filed by the parties. Three Judges, entirely different from those who had heard the original Circuit Court proceeding, heard and determined the second proceeding. They sustained monetary relief against the Browns, but also reversed the Trial Court and ordered an injunction granted. In doing so, they made the curious comment: "The case is no longer in the situation as when it was previously before this court. Gem has since been found to be in continuous violation of the order."

That simply is not the case. It is not the record. There has been before the Court one proceeding endeavoring to determine whether Gem was or was not covered by the Act. It is admitted that, though denying coverage, it has performed every act including filing of reports required by the act, simply denying that it is a handler under the act, and requesting that that matter be adjudged. The Trial Court did not find that "Gem has been in continuous violation of the Order". Contrarily, it, the trier of the fact, found that the injunctive relief should be denied, even though monetary relief was granted, because "No evidence justifying the same" had ever been presented to the Court.

Reconciliation of these polarly opposed determina-

tions by two different groups of circuit judges within the same circuit was sought by the device of argument en banc. However, in order that rehearing en banc be granted, it is needful that there concur at least one of the judges whose opinion is sought to be reheard. Accordingly, this expedient failed.

Since the Circuit Court in the second matter also failed to give any consideration to the palpable procedural deficiencies involved or to the determinations of this Court in *Lehigh Valley,* supra, we here seek certiorari.

The accounting facts and operations of the milk order are very complex indeed. The deficiencies of the administrative record are detailed, and would properly be presented in a detailed brief. Within the rule of "conciseness" requisite under Rule 23, we surmise that such detail is here not pertinent, though it is very specifically set out in the briefs and presentations below.

The United States District Court's jurisdiction, explicitly as required by Rule 23(h), was predicated, insofar as the government's claim is concerned, upon referred 7 U.S.C.A. 608a(6), and insofar as concerns review the intermediate action or non-action of the Secretary of Agriculture, upon the referred 7 U.S.C.A. 608c(15)(B).

Jurisdiction of this Court is, as aforesaid, predicated upon the provisions of 28 U.S.C.A. #1254(1), reviewing actions of the Circuit Court upon appeal from actions of the District Court of the United States for the District of Colorado, brought within the time requirements of 28 U.S.C.A. #2101(c).

ARGUMENT:

I.

THE UNITED STATES COURTS, IN ANY STATUTORY INJUNCTIVE PROCEEDING, MUST BE FREE TO EXERCISE EQUITABLE DISCRETION AND ANY ATTEMPT TO LIMIT THAT DISCRETION OR TO BIND IT BY IT BY THE BOND OF ADMINISTRATIVE DETERMINATION *IS A BASIC INVASION OF THE JUDICIAL POWER.*

Essentially jurisdiction of the United States District Court for the District of Colorado was invoked by the United States under 7 U.S.C.A. #608(a)(6), which simply provides: "The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

The government effectively contends that since regulation of milk is an important area of regulation, once an administrative "determination" is made that regulation be had, the Federal Courts are *required* to grant injunctive relief upon the predicate of the findings of the milk administrative body; that they do not have the right to exercise discretion; and that in some manner this provision is mandatory upon them.

The Trial Court refused to grant preliminary injunctive relief, and was upheld in so doing by the Circuit Court. The Trial Court refused, even though granting a monetary judgment, to grant final injunctive relief, specifically holding that "the injunctive relief requested by the

United States is denied, no evidence justifying the same having been presented to the Court." There could be no better reason for denying injunctive relief.

The government insisted, upon a cross-appeal, that the trial court *must grant* an injunction, and a different group of Circuit Judges concurred in that contention, stating that the situation was in different case than the first determination since "Gem has since been found to be in continuous violation of the order." Nothing has been "found" with relation to Gem except that which had been found by the Trial Court, and its only finding was that there was "no evidence justifying" an injunction which had been presented to the Court.

In the initial decision, the Court discusses the decision of this Court in *United States vs. Ruzicka,* 329 U.S. 287. The Court, referring to that case which is the cornerstone of the Government's argument, says that the case was one upholding, rather than denying, a preliminary injunction, and quotes this Court as saying:

"* * * And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States for the enforcement of an order under #8a (i.e. 608(a), the statute here involved)."

The Circuit Court accordingly announced that: "we do not believe that the Supreme Court in the Ruzicka case meant to, or did, withdraw from the courts their traditional and long standing power to exercise judicial discretion in equitable proceedings."

The government now contends, and the second decision of the Circuit, through a different set of judges, has apparently held that Ruzicka means that if any conten-

tion of a handler as to monetary liability is overruled, then not only is a *monetary judgment* proper, but he *must be enjoined,* so that any future dispute will allow contempt of court penalty, and so, of course, dispute will be discouraged. One does not dispute the power of the federal government under penalty of injunctive relief. The Court found no fact to exist or to have been shown justifying injunctive relief, and that was within the equitable purview of the Court, which does not have to grant an injunction merely because it does grant a monetary judgment. If so, there is a clear invasion by Congress of the equitable powers of the Court, since Congress can only declare the *occasion* upon which an injunction may be granted, but cannot state that upon any occasion it *must* be granted, that being in all cases a matter to be weighed and determined by the Courts, and particularly by the trier of the fact. The trier is the lower Court. When it finds that no evidence justifying an injunction has been presented, it is not the appellate right of the Circuit Court, without citation of any evidence to the contrary, to impose injunctive relief. The Circuit thus entirely exceeds its authority.

It seems that at least three sets of judges in this jurisdiction have sharply disagreed one with the other as to the meaning to be imputed to the decision in the *United States vs. Ruzicka.* That in itself, in an area of consequence as vital to a major segment of the food-producing economy as is governed by the milk orders, we submit justifies a clarification of the meaning of *Ruzicka,* and hence certiorari here.

More importantly, however, we urge that it is fundamental that the Congress cannot make mandatory upon the Courts the imposition of any equitable order. The Courts are co-equal with the Congress. The matter of is-

suance of injunctions, separate from the occasion of their issuance, is entirely judicial in nature. Interferences by the Legislature with the basic judicial prerogative have not been uncommon in Colorado, and, since there is no abundance of Federal Authority in this vexed constitutional field, we take the liberty of utilizing what we believe is pertinent language from a Colorado authority, *Walton vs. Walton,* 86 Colo. 1, 278 Pac. 780. There the legislature presumed to declare under what circumstances a Court *must* grant a divorce. The Court, determining divorce to derive from its equitable powers, struck down as violating Colorado constitutional separation of powers (Article III of the Colorado constitution making express what is federally implied). It stated that the statute was so mandatory in its provisions that there can be no discretion whatever exercised by the courts. When queried as to whether in the case at bar that was the contention, the government's counsel have not been hesitant to state that that is precisely their contention. If so, it is a bad and dangerously founded one.

The Colorado Court accordingly, faced with this attempted mandatory application of its equitable powers, stated that when the legislature has enacted a statute prescribing the grounds of divorce and steps necessary to give a court jurisdiction, it has discharged its duties and exhausted its powers with relation to the matter. Thereafter, when the court has acquired jurisdiction, the court must be left to determine the case and to issue its decree, or to withhold it, in accordance with the established rules relative to the exercise of equitable jurisdiction within the area of its jurisdiction.

Similarly, it is contended, when the Congress has set the stage for an administrative remedy, the seeking of in-

junctive relief, it has done all that it can do. Thereafter, it is within the sound discretion of the Courts to allow or to disallow injunction, and, fundamentally, that discretion of the lower or trial court will not be interfered with by the appellate court, it being a matter of factual determination. The Colorado Court on this occasion spoke strongly, and since we believe the matter to be constitutionally vital, we quote that statement (page 16 of the official report).

> "The statute in question, it will be observed, leaves no discretion whatever in the courts, and by it the legislature has undertaken to direct a court, exercising equity jurisdiction, when, to whom, and at whose behest its decree shall be granted. The legislature has, by its statute, virtually determined that the equities of the case shall be disregarded, and the guilty stand on an equality with the innocent. It will be conceded that the legislature may abolish all divorces, and thus deprive the court of jurisdiction in these cases, but when the legislature has enacted its statute prescribing the grounds of divorce and the steps necessary to be taken to give the court jurisdiction, it has fully discharged its duty and completely exhausted its powers. When the court has acquired jurisdiction, it must be left to determine the case and issue its decree in accordance with the well-established rules prevailing in that jurisdiction. The legislature may, in its wisdom, provide that no decree shall issue within a certain period, but when it undertakes to determine, that after the expiration of that period, the guilty have been completely absolved from the consequence of their guilt, and can then demand the court's decree, either with or without the express opposition of the innocent, it has over-stepped."

We do not believe that the Congress has given such mandate to the Courts by the language used. We believe and submit that the Court is fully free to grant or withhold equitable enforcement, and that, indeed, it can give legal judgment for money without equitable orders at all, and if it choose to do so, that is in the discretion of the trial court as trier of fact, and not within purview of the Circuit to interfere. We so submit. We believe it most important in view of the wide economic area covered by this asserted authority of the Agriculture Department that the right of that department to demand injunctions by "rubber stamp" process from the Courts be determined by this Court either to exist as contended to exist or not to exist. For this reason we ask certiorari, and we believe and respectfully submit that it is a strong and valid reason to ask this Court to review and to rule.

II.

THE COURTS BELOW HAVE IGNORED AND FAILED TO APPLY THE LEHIGH VALLEY DECISION OF THIS COURT, WHICH CONSTITUTIONALLY INVALIDATES THE THEORY OF "POOL MILK" WHEN, AS AT BAR, THE PRODUCERS AND OWNERS OF MILK ARE EXCLUDED FROM THE MARKET AND PENALIZED ON ENTRY INTO IT, AND MADE TO CONTRIBUTE TO A FUND FROM BENEFICIATION OF WHICH THEY *ARE ARBITRARILY EXCLUDED.*

Since the original determination in *Nebbia vs. New York,* 291 U.S. 502, it has been the habit of agricultural regulationists to assert the speciality of the problem of milk, and to claim that its peculiarity of supply give to

it a special quality which seemingly will justify any legalistic imposition upon the area of its production, marketing, and distribution, Unfortunately, the conditions obtaining in 1937 with relation to milk as a surplus agricultural commodity, have absolutely no relation to the present fact of milk marketing in Colorado. Rather than a situation in which a number of small producers were at the mercy of rapacious handlers, in a market glutted with their product, we have a situation in which a single major milk cooperative controls nearly the total Colorado supply; milk is chronically short in the area; and there is a perpetual price warfare among small delivery dairies, large manufacturing dairies, and competing grocery chains often owning dairies. The small dairy handler (such as the Browns) has in this milieu been driven to financial destruction.

The Browns own a very small, family-operated dairy business, almost wholly devoted to direct route delivery, at retail, of milk. Because milk is not only not in surplus, but in this market is desperately hard to come by, they made certain of the six herds (later reduced to five) from which their supply of milk derives by purchasing for substantial cash consideration ownership in the cattle and absolute ownership of the milk produced from them. They were thus able to own and control a reliable supply of milk of high quality for bottling and for home delivery.

They are not manufacturers of subsidiary dairy products.

It is admitted that they do not obtain and have never obtained milk from any source other than the six owned and controlled herds. They have no source of supply in the cooperative marketing monoply, and their co-owners of the cattle are not involved in that cooperative. No

other person has recourse to the milk from the subject herds, and that milk is not pooled with any other, nor is any milk drawn from any pool utilized by or even available to the Browns, who use only their own herds as a supply source.

The situation existed in fact long before the Milk Order or any hearings concerning it. The contract status of ownership was formalized by written instruments in May, the milk order being neither promulgated nor effective until November following.

The theory inherent in the Milk Order under the Act is that substantially all milk in a given area is considered to be in a "pool", from which users draw for wholesale or retail delivery, and from which manufacturers of by-products, such as ice cream, cheese, butter, and the like also draw, as do lower uses still, such as evaporators, condensors, and dryers and industrial users of milk.

Price paid obviously varies for varying milk uses. By a complex process defined in the order there is arrived at a "pooled" or "blended" price for milk, reached substantially after the event of use, since under the hypotheses of the Order, it is not determinable until an audit of the aggregate reports of handlers show the whole of the uses to which milk in the area, AND FROM THE POOL, has been put during the month past.

It is assumed that milk is more valuable for bottled delivery than for other purposes. Therefore, if a dairy uses all of its milk for bottling and home delivery — as the Browns basically do — that dairy is presumably required to pay more for the milk than a dairy utilizing the same milk, in the same amount, and of like quality, for one or more of the "lower" purposes as well. The dairy which

bottles and sells milk to a consumer is required, therefore, to pay into the "pool", through the producers settlement fund, a bonus, which aggregated bonuses are later paid out to some other producer or producers.

It is admitted upon the record by Administrator Luke that although the government demands that the Browns contribute to this fund, to subsidize manufacturers of cheese, butter, ice cream, and the like, neither the Browns, as producers and owners of milk and owners of dairy herds, or their co-owners of the herds, may ever withdraw anything from the fund. They are absolutely debarred from obtaining anything from the producer settlement fund, because they are not considered to be in the pool for purpose of withdrawal, but are required to pay into the fund.

Whatever may be asserted to the contrary, the testimony in this case, shown upon the record, outlined in the statement of the case, is unequivocal that the Brown milk is not in the pool, but that the Browns are required to supply money to the producers settlement fund. Neither they nor their co-owners can withdraw anything from it in compensation, and the Browns are simply penalized for bottling and selling their milk at retail, and are forced to subsidize the purchase of raw material — while themselves paying for it at full price — for their larger and far wealthier competitors.

The theory of the "pool" and of equalization rests on the most questionable postulates. It has never been firmly established, and it is legally untenable when applied to milk like the Brown milk which is not purchased out of the pool at all, but which is processed by one who is producer and handler as well.

For this reason, the very Milk Order exempts the

producer-handler. However, the Administrator claims the right to determine who is a producer-handler, and to so determine without evidence, without hearing, without notice, and by ukase. He arbitrarily has determined that the Browns and their milk are required to pay into the fund, but cannot withdraw from it. Such is the logic only of Alice in Wonderland, a useful and uni-directional pragmatism, difficult to comprehend, and grossly invalid when used procrusteanly as a legal standard.

The underlying theory of "equalization" becomes economically insufferable when it operates as in Denver to the total destruction of the independent dairy, such as the Browns. Such a unit is economically weak at best, but when forced to pay, as the weakest of economic operators, the highest price, because it sells directly to the consumer of milk, such dairies cannot exist. The small dairy has none of the economic advantages of diversified product or scale distribution. Two-thirds of such units in Denver have died in the last 10 years. 90% of Denver's milk business is done by 7 national milk chains. 90% of the Denver-area milk is controlled by a single marketing cooperative, devoted to perpetuation of milk scarcity within the area, and actively engaged in seeking to debar "foreign" milk from the area or penalize its entry.

Despite this, the Browns have tried to maintain a supply of high quality milk, including the only Kosher milk supply approved in the area, and done so under heavy economic penalty. They cannot do so in the face of unilateral Agriculture Department harrassment as well.

For the reasons indicated, the producer settlement fund theory has been under constantly increasing attack. This Court discusses the underlying problem in detail in

Lehigh Valley Cooperative Farmers, Inc. et al. vs. U.S., 370 U.S. 76, 82 S.Ct. 1168. As this Court recognizes, "the system of regulation contemplates economic control only over 'poolhandlers' plants, since only such handlers are required to pay the 'blend price' to their producers and to account to the producers settlement fund." Precisely this is the contention of the Browns. They do pay full blend price, and this is admitted. They are not, however, a pool-handler plant. They do not buy from the pool, nor contribute to it, and cannot be compensated, nor can their co-owners, from the settlement fund.

In *Lehigh Valley,* attempt was made by a "compensation fund" device to limit milk from outside the territorial scope of the order, as, precisely, in this case the attempt is made to limit Browns, who are outside the functional economic scope of it. Such limitations were held in *New York-New Jersey Milk Marketing Order, Hass vs. Brannan,* 196 F.2d 791, 795 (CCA 2d, 1952) to be invalid. This Court agreed in *Lehigh Valley* that the Department of Agriculture by its orders had sought to confiscate the benefits inherent in non-pool arrangements, just as there is here attempt to confiscate the benefit the Browns derive from herd ownership.

The Court remarks: "In fact, therefore, the nonpool milk is forced to subsidize the pool milk from the competitive impact caused by the entry of outside milk." Accordingly, this Court held that the payments required of the nonpool milk were invalid, and stated: "Nor is the compensatory payment clause saved by the circumstances that in some instances it may also fortuitously operate to put the handlers of pool and non-pool milk on a competitve par."

The Browns contend that they are not required to subsidize the pool milk against impact of their own self-owned milk, and they are not required to subsidize their manufacturing competitors. They believe and submit this Court as so held.

This argument, again, should be much amplified, in briefs, but is set forth here as a ground for and predicate for hearing of the matter by this Court upon certiorari.

III.

FINALLY, IT IS ASSERTED THAT THERE CANNOT BE AN ADJUDICATION AGAINST THE BROWNS WHEN THEY HAVE BEEN DENIED SUBSTANTIALLY EVERY ONE OF THE REQUISITES OF PROCEDURAL DUE PROCESS AS REGARDS *ADMINISTRATIVE HEARING AND DETERMINATION.*

The Browns have continually contested any obligation to pay into the producer settlement fund upon the basis that they are not and cannot be considered "handlers" within the Act or Order. The Milk Market Administrator has stated that he has "determined" that they are. He has admitted, however, that he held no hearings, served no notices, took no evidence, and had no basis except hearsay "reports" not of record and undefined from administrative deputies unspecified. The Milk Administrator cannot "determine" any thing without following the judicially requisite mode of hearing, including notice, right to be heard, and right to be represented. If hearing is otherwise attempted or essayed, then it constitutes a deprivation of property without due process, which renders any statute purporting to authorize the procedure void, as held in *Morgan vs. United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288.

A.

WHEN THE ACT OF THE ADMINISTRATOR IS A QUASI-JUDICIAL OR JUDICIAL ACT, THEN NOTICE AND HEARING ARE OF ITS ESSENCE, AND THEIR ABSENCE IS FATAL, NO MATTER WHAT THE CORRECTNESS OF *SUBSTANTIVE RESULT.*

It is admitted that no notice or hearing was granted the Browns. The matter of determination of their status is most certainly a judicial or quasi-judicial one. The principles again require detailed exposition by Brief, but may be stated simply in the language of 42 Am. Jur., 470, Public Administrative Law, #135: "Although a statute reposing power in an administrative officer to determine a certain question may be held to require a hearing for such determination even though there is no express requirement thereof, especially in view of the rule that a statute must be construed as constitutional where such construction is possible, it is generally held that a statute which does not require notice and hearing where notice and hearing is necessary is unconstitutional, even though notice and hearing may actually have been had under it. Extraofficial or casual notice, or a hearing granted as a matter of favor or discretion and not as a matter of right, cannot be deemed a substantial substitute for due process of law which the Constitution requires."

Morgan vs. United States, supra, recognizes that any order of the Agriculture Department not made upon full hearing was to be set aside. It is contended that something mystical in the nature of milk requires action without hearing, and this negated, again by the encyclopedic statement, 42 Am. Jur. 472, Public Administrative Law #135, which points out that "from the fact that the legislature

might, without notice or hearing, require by direct order the doing of a certain act, it does not follow that an administrative officer may be empowered, without notice or hearing, to order the same act upon his own opinion and with finality." Speaking of the Agriculture Department, this Court in *Morgan vs. United States,* 304 U.S. 1., 58 S.Ct. 773, 999, 82 L.ed 1129, held that fair and open hearing was essential to the validity of administrative regulation, and that did not mean determination by subordinates upon indeterminate bases. A process of rubber stamping the prosecuting authority was also interdicted by this Court:

> "Congress in requiring a 'full hearing' had regard to judicial standards — not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponents to know their content and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in taking or consideration of evidence, but extend to the concluding parts of the procedure as well as the beginning and intermediate steps."

It is submitted that every one of these criticisms still fully applies to the totally inadequate procedures of the Department of Agriculture, arbitrary in the extreme under the Milk Marketing Order, even to the denial of

hearing before or an opinion or order by the Secretary of Agriculture, though explicitly required by statute. The "Judicial Officer", Mr. Flavin, is not the Secretary. He is not empowered in his own name to issue final opinions. He has no authority and cannot be given it. The secretary is required under the statute to act, and refused to. The action is not a "regulatory" proceeding, but is a "judicial" one, and only by the person to whom the authority is given, can the authority be essayed.

The statute required that "after such hearing, the Secretary shall make a ruling upon the prayer of such petition, which shall be final, if in accordance with law." The Secretary did not hear. He did not decide. He did not rule, or at any time take any action. All action was by the Judicial Officer in his own name, not that of the Secretary, and exercising non-delegable judicial power, contrary expressly to the general principal set out in 73 CJS 380, Public Administrative Bodies and Procedures #57: "Administrative officers and bodies cannot alienate, surrender or abridge their powers and duties or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment'. The rule derives from *Morgan et al. vs. U.S.*, 298 U.S. 468, where it was held:

"This necessary rule does not prelude practicable administrative procedure in obtaining the aid of assistants in the departments. Assistant may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates.

Arguments may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the perfomance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The Secretary must do *something* in the procedure, whereby under statute *only he* is empowered to rule. He is not only empowered, but the statute is imperative: "*THE SECRETARY SHALL MAKE A RULING* upon the prayer of such petition." He never ruled at all. No ruling was made even in his name. Mr. Flavin ruled, and in his own person, and Mr. Flavin, we submit, cannot be given the ultimate power which the statute gives the SECRETARY OF AGRICULTURE, and no one else in a circumstance purely judicial, the adjudication of a particular contested case.

We believe this procedural matter of major significance, and submit it, also, is a basis for grant of certiorari.

B.

IT IS FINALLY SUBMITTED THAT THE RECORD DOES NOT CONTAIN THE DATA NECESSARY TO *SUPPORT A MONETARY JUDGMENT.*

Monetary judgment is in no sense sustained by the record. It is freely admitted in the testimony, as referred in the statement of the case above, that each of the data sheets upon which computations are claimed to have been

made, and which are the government's exhibits, lack one or more essential data.

These it is claimed are found in "bulletins".

The bulletins nowhere appear in the record.

What is more serious, there is no finding or noting on the record of their content. While sometimes an administrative tribunal may take note of what resides upon its files, it must at least spread them on the record so that a reviewing court is placed in equal position with the administrative tribunal. If that is not done, then the record cannot be held to sustain judgment. Here it simply was not done. The judgment cannot be calculated from the record.

CONCLUSION:

It is in conclusion most respectfully prayed that certiorari be granted herein and that there be reversal of the judgment of the Circuit Court herein referred.

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Appendix A.

211 F. Supp. 953.

United States of America, Plaintiff,

v.

Fred A. BROWN and Jennie B. Brown, doing business as Gem Dairy, Defendants.

Civ. A. No. 7549.

United States District Court
D. Colorado
Dec. 27, 1962.

Lawrence M. Henry, U.S. Atty., for District of Colo., Merle R. Knous, Asst. U.S. Atty., Denver, Colo., for plaintiff.

Creamer & Creamer, George Louis Creamer, Denver, Colo., for defendants.

DOYLE, District Judge.

Plaintiff has moved for summary judgment decreeing a mandatory injunction and an award of damages in an action instituted under Section 8a(6) of the Agricultural Marketing Act. The suit was brought to compel the defendants to comply with the provisions of Milk Order No. 137, as amended (7 C.F.R., Part 1137; formerly designated as Order No. 1, 7 C.F.R., Part 901). This is a regulation which pertains to the handling of milk in the eastern Colorado marketing area.

The defendants are doing business as Gem Dairy. Their principal place of business is located at 5300 Vallejo Street, Denver, Colorado. The Marketing Administrator, a duly appointed agent of the Secretary of Agriculture,

who is empowered to administer the provisions of the Act in question together with the regulations issued pursuant thereto, has sought to subject the defendants to the provisions of the Milk Order.

The Administrator has ruled that the defendants are "handlers" within the meaning of the Act and the Order (7 C.F.R. 1137.9). The Browns have filed under protest, the reports required by the Administrator, but have refused to recognize any liability to contribute to the Producers' Settlement Fund. They refuse to contribute on the ground that they are parties to contracts with suppliers; that under the terms of these contracts they are the owners of a one-tenth undivided interest in the cows which produce the milk and are the owners of the entire supply of milk produced by these cows. These contracts further provide that payments for the milk produced are compensation for services rendered by the suppliers and do not constitute the payment of purchase price for the milk itself.

Through various informal proceedings, the Administrator obtained the information set forth above. Most of it was supplied by the attorneys for the Browns by correspondence. The matter was never set for formal hearing.

Upon the basis of the facts thus obtained the Administrator determined the defendants were "handlers" and were subject to the Milk Order. The present action was instituted by the Government after demands had been made upon the Browns to pay the sums assessed against them as handlers and upon their refusal to comply with these demands.

The position of the defendants is that the effort on

the part of the Administrator to exercise jurisdiction over them was, in view of the facts:

1) Unconstitutional and void; and

2) That the method followed by the Administrator in gathering the facts and making his determination constituted a deprivation of procedural due process of law;

3) That the order which the Administrator seeks to apply was issued subsequent to the contracts between the defendants and their suppliers; that by reason of this attempted impairment of a preexisting contract there is a deprivation of substantive due process of law;

4) That the amount has been assessed against them arbitrarily and constitutes the exaction of a penalty for utilization by the Browns of their own property.

The Government takes the position that this Court lacks jurisdiction to entertain the defendants' contentions inasmuch as there has been a failure on the part of the defendants to exhaust the administrative remedies which the Act provides and that until an appeal has been processed through the Secretary of Agriculture this Court is powerless to review the action of the Administrator.

It is said that this Court is restricted to determination of:

1) Whether the Market Administrator has found that the defendants are subject to a marketing order; and

2) Whether the defendants are presently violating such order.

Therefore, the limited issue for determination here is whether the defendants may in these enforcement proceedings obtain a judicial determination as to whether

they are, or are not "handlers." This must be considered in the light of defendants' contention that their constitutional rights have been and are being infringed.

There can be no doubt concerning the authority to issue the milk order in question. This general regulatory scheme has been upheld by the Supreme Court in United States v. Rock Royal Co-Op. Inc., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. It is also clear that if the defendants were shown to be "handlers" they would be compelled to exhaust all administrative remedies prerequisite to determination of defenses for court determination. See United States v. Ruzicka, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290; United States v. Mills, (Md.1960) 185 F.Supp. 709; United States v. Ideal Farms, Inc., (3 Cir., 1958) 262 F.2d 334; United States v. Hinman Farms Products, (D.C.N. Dist. N.Y.1957) 156 F.Supp. 607.

[1] Furthermore, the United States is entitled to mandatory injunctive relief when a violation has been established. Crull v. Wickard, (6 Cir., 1943) 137 F.2d 406; United States v. Turner Dairy Co., (7 Cir., 1947) 162 F.2d 425.

[2] The pendency of proceedings before the Secretary of Agriculture pursuant to Section 8c(15) (A) will not be the basis for staying the proceedings. The case at bar is somewhat unique in that the defendants contend that they are not "handlers" and thus that they are beyond the reach of the Act and of the regulations. Nevertheless, orderly procedure demands that the question be submitted first to the Secretary of Agriculture even though the constitutional issue is tendered. If, as defendants contend, they are in fact and in law beyond the reach of the Secretary and the Administrator, and if, as they further contend, an effort on the part of the Administra-

tor to classify them as "handlers" constitutes a deprivation of procedural and substantive due process, it is impossible to see how an appeal to the Secretary could prejudice their legal position, particularly in the light of the fact that they have sought to raise the issue in court.

It is also to be noted that the regulation defining the term "handler" (7 C.F.R. 900.51 [i] Supp.1962) is broad indeed. It includes not only a person who is subject to a marketing order, but also one to whom a marketing order is sought to be made applicable. Therefore, the Market Administrator appears to have authority to act as to prevent evasions and so as to offset efforts to circumvent regulation by legal techniques.

While recognizing the existence of authority under this court's general equity jurisdiction to hear constitutional defenses (see Crowell v. Benson, 285 U.S. 22, 54, 52 S.Ct. 285, 294, 76 L.Ed. 598; St. Joseph's Stockyards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033); nevertheless, where, as here, Congress has provided a regulatory scheme under which technical experts consider and determine the economic problems which arise under the regulations, which experts are in a superior position to assess the practical aspects of the attempted regulation, there should be and is a reluctance to interfere with the machinery which has been created to deal with the specific problems.

[3] It is thus apparent that the question is more of timing and order of proceedings rather than of possible deprivation. The Court is, therefore, of the opinion that the defendants must exhaust their administrative remedies and must obtain a determination of their contention, at least as to the propriety of their classification as a

"handler" from the Secretary of Agriculture before demanding a court adjudication of the Secretary's definitions and classifications as well as adjudication of the attendant constitutional questions.

[4] The other aspect of the Government's position, namely, that this Court must without investigation of the facts and law, perfunctorily enter an interlocutory injunction and also enter a money judgment, is substantially lacking in palatibility. It may be that the Congress intended that the Court act as a mechanical enforcing arm of the Department of Agriculture; however, the Act does not clearly express such a policy. It *does* declare that the pendency of an appeal from the Secretary to the Court shall not impede the Secretary from obtaining compliance relief. 7 U.S.C. § 608c(15) (B).

The Act also vests district courts of the United States with jurisdiction to enforce the regulations by enjoining their violation. 7 U.S.C. § 608a(6).

A careful reading of these two sections fails to reveal imposition by the Congress of a mandatory requirement o nthe court to grant relief of the kind here sought, regardless of the seeming merits of the defendants' contentions.

Based upon the foregoing expressions, it is concluded that the motion for summary judgment should be and is hereby held in abeyance for a period of thirty (30) days so as to give to the defendants an opportunity to process their contentions administratively. If the defendants choose to stand upon the record and if they do not tender evidence by way of filing a notice in Court that they are appealing the Administrator's ruling to the Secretary of

Agriculture within the thirty-day period, the Court will then issue a mandatory injunction requiring the defendants to comply with Milk Order No. 137 and restraining defendants from all further violations of the Act and shall proceed to hear proofs looking to the entry of a money judgment covering all assessments to defendants. If the defendants pursue their administrative remedies in good faith looking to obtaining of the determination of the Secretary, the Court will postpone adjudication of their contentions and shall also postpone the imposition of a money judgment until the Secretary has ruled. This will permit the Court to entertain simultaneously defendants' appeal from the Secretary and the Government's application for judgment. It is

FURTHER ORDERED that the defendants shall comply with the regulations insofar as they require reports and information pending the final decision as to their liability under the order.

Appendix A-1.

217 F. Supp. 285.

UNITED STATES of America, Plaintiff,

v.

Fred A. BROWN and Jennie B. Brown, doing business as Gem Dairy, Defendants.

Civ. A. No. 7549.

United States DistrictCourt
D. Colorado.
May 9, 1963.

Lawrence M. Henry, U.S. Atty., for the District of Colorado, Merle R. Knous, Asst. U.S. Atty., Denver, Colo., for plaintiff.

Creamer & Creamer, George Louis Creamer, Denver, Colo., for defendants.

DOYLE, District Judge.

The United States has filed a motion seeking a preliminary injunction compelling defendants to pay certain amounts which are alleged to be due and owing to the producer-settlement fund. These amounts were assessed by the Market Administrator pursuant to the Agricultural Marketing Act, 7 U.S.C. § 601 et seq. and Milk Order No. 137, as amended 7 CFR Part 1137, et seq.

The matter was before the Court previously on the plaintiff's motion for summary judgment and on that occasion the motion was denied provided the defendant took immediate steps to process its administrative appeal.

The Court is reluctant to grant the requested relief because there are two undecided questions: the first of

these is whether the defendants are "handlers" subject to the Act; and secondly, whether the Market Administrator followed correct procedures in determining that the defendants were "handlers."

To grant the relief demanded by plaintiff now, subject to review by this Court at some later time, does not seem reasonable and, moreover, is not required by the statute.

To be sure, the Government contends that it is sufficient for the Market Administrator to make an ex parte finding that the defendants are "handlers" and, therefore, subject to the Milk Order in order to support a money judgment under Section 8a(6), 7 U.S.C. § 608a(6). Such a mandatory requirement that all orders of the Market Administrator be specifically enforced mechanically and without any regard to defenses raised by the defendant is not apparent. The language of the act is: "The several district courts of the United States are *vested with jurisdiction to specifically enforce* * * *." This contains no language which can be interpreted as a congressional mandate withdrawing from this court the power to exercise its discretion in refusing injunctive relief which it deems unfair and improper.

See Jaffe: The Judicial Enforcement of Administrative Orders, 76 Harvard Law Review 869 (1963), wherein is found the following:

"* * * This implies, does it not, that when the time comes finally to exact the penalty, finally to impose force, this court's ever-present responsibility for doing justice is involved? A court should rarely be required—nor should it be thought that there is any intention to require it—to participate actively in the enforcement of a judgment which it finds offensive. * * *"

It is true that Section 8c (15) (B) states that the pendency of administrative proceedings should not impede the Secretary from obtaining relief, and thus the fact that such proceedings are now in process, in compliance with an order of this court, is no bar to the Secretary's present action. However, it is not the pendency of administrative proceedings which impedes this court from granting the relief sought, but doubt concerning the applicability of the regulatory scheme to the defendants, and the proper determination of this issue affects the Secretary's right to such relief.

The court has not refused the relief sought by the Government, but has merely postponed judgment upon the matter until such threshold questions can be judicially determined. Although the court finds that it is within its jurisdiction to determine the applicability of the Act to these defendants, it prefers to do so after the Department has had the opportunity to review the matter and, in so doing, to afford the defendants a "determination" of this issue which meets the requirements of due process.

Having decided that this is the sensible, expeditious procedure to follow, it is, therefore,

Ordered that the motion for a preliminary injunction be, and it is hereby denied.

Appendix B.

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 7433 — April Term, 1964

UNITED STATES OF AMERICA, Appellant,

v.

FRED A. BROWN and JENNIE B. BROWN, doing business as GEM DAIRY, Appellees

---

Appeal from the United States District Court for the District of Colorado

---

[Filed April 29, 1964.]

Sherman L. Cohn, Attorney, Department of Justice (John W. Douglas, Assistant Attorney General, Lawrence M. Henry, United States Attorney, Alan S. Rosenthal and Barbara W. Deutsch, Attorneys, Department of Justice, on the brief), for Appellant.

George Louis Creamer (Nathan H. Creamer on the brief) for Appellees.

Before BREITENSTEIN and HILL, United States Circuit Judges, and KERR, United States District Judge.

PER CURIAM.

This appeal is from an order of the District Court denying the application of the United States for a mandatory injunction requiring the appellees-defendants to comply with certain provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq. The case was argued and finally submitted on January 8, 1964. On April 9, 1964, the United States filed a motion to dismiss the appeal on the ground that the case had become moot. The District Court case is still pending and an application has been made to consolidate it with another case involving similar issues. In the circumstances, it appears that there is a recurring possibility of an application for injunctive relief; that the government gives no assurance that it will not seek further injunctive relief; that the issues in the consolidated case are such that possibility of further requests for similar relief exists; and that the issues involved are of public interest. Accordingly, the motion to dismiss the appeal is denied. See Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al. v. Missouri, 361 U.S. 363, 368-369, and Southern Pacific Terminal Company v. Interstate Commerce Commission and Young, 219 U.S. 498, 514-516.

Appendix B-1.

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 7433 — April Term, 1964

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Sherman L. Cohn, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, Lawrence M. Henry, United States Attorney, Alan S. Rosenthal and Barbara W. Deutsch, Attorneys, Department of Justice, on the brief) for Appellant;

George Louis Creamer (Nathan H. Creamer on the brief) for Appellees.

Before BREITENSTEIN and HILL, United States Circuit Judges, and KERR, United States District Judge.

HILL, Circuit Judge.

This appeal by the United States is from an order of the court below denying its motion for a preliminary mandatory injunction compelling the appellee-defendants, as alleged "handlers" of milk, to make certain payments into a producer-settlement fund established pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C.A. § 601, et seq. United States v. Brown, 217 F. Supp. 285 (D. Colo. 1963).

The action was brought under the provisions of Section 8a(6) of the Act, 7 U.S.C.A. § 608a(6), to require the appellee to comply with milk order No. 137, as amended, 7 C.F.R. § 1137.1 et seq., (formerly designated as Milk Order No. 1, 7 C.F.R. Part 901), regulating the handling of milk in the Eastern Colorado Marketing Area. The order is directed toward sales of fluid milk in the marketing area and defines what is meant by the terms "handler", "producer" and "producer-handler". See 7 C.F.R. §§ 1137.9, 1137.10 and 1137.11, respectively. It also establishes a producer-settlement fund, 7 C.F.R. § 1137.83, to equalize the payments made to the farmers by the handlers and, unlike some orders relating to other marketing areas, provides that a producer-handler is exempt from certain of its provisions, including payments into the producer-settlement fund, 7 C.F.R. § 1137.60.

The complaint in this case alleges that the appellees do business in the Denver, Colorado, area; that milk order No. 137 was issued pursuant to the provisions of the Act to regulate the handling of milk in the marketing area; that the Market Administrator, as the agency appointed by the Secretary of Agriculture to administer the provisions of the order, duly determined that, during the time in question, the appellees were "handlers" of milk as de-

fined in the order and therefore they were subject to the provisions of the Act and the order; that the appellees had handled milk in violation of the Act and certain provisions of the order, 7 C.F.R. § 1137.84, by refusing and failing to pay to the Market Administrator, for and on behalf of the producer-settlement fund, the sums of money alleged to be due; and that the appellees were continuing to handle milk in violation of the Act and order and additional payments would become due each month. The complaint prayed for a mandatory injunction compelling the appellees to pay to the Market Administrator for and on behalf of the producer-settlement fund all sums alleged to be due from them and for a permanent injunction restraining them from further violations of the Act and the terms and provisions of the order.

The appellees filed an answer in which they denied that they were subject to the provisions of the Act or the order and specifically denied that the Market Administrator had made any such determination. It was affirmatively alleged that "* * * any determination, as a matter of due process, would have to be made pursuant to hearing, after notice, and that no such notice or hearing have ever been given or had; that these Defendants are not subject to the act, inasmuch as they are dealing with milk produced from herds in which they in each case own substantial interests, and are accordingly producers, who cannot be required as to their own milk to adhere to the requirements made of others dealing in milk produced by third persons * * *."

With issues thus joined, appellant filed a motion for summary judgment and in support thereof submitted an affidavit together with exhibits attached thereto, of the

Market Administrator setting forth many of the facts alleged in the complaint and motion. The Browns executed and filed a traversing affidavit. The court issued an order holding the motion in abeyance for thirty days so as to give appellees an opportunity to commence administrative proceedings under Section 8c(15) (A) of the Act, 7 U.S.C.A. § 608c(15) (A). Appellees duly commenced administrative proceedings within the thirty-day period and such proceeding is now pending in the Department of Agriculture. The United States then filed a motion for preliminary injunction, which was denied, and this appeal followed.

The authority of an appellate court, upon review of an order granting or denying temporary or preliminary injunctive relief pending the trial and final determination of a case, is limited. Local 180 of International Union, etc. v. J. I. Case Co., 7 Cir., 281 F.2d 773; Minnesota Mining & Mfg. Co. v. Polychrome Corp., 7 Cir., 267 F.2d 772; W. A. Mack, Inc. v. General Motors Corporation, 7 Cir., 260 F.2d 886; Westinghouse Electric Corp. v. Free Sewing Machine Co., 7 Cir., 256 F.2d 806; Carroll v. Associated Musicians of Greater New York, 2 Cir., 284 F.2d 91; Joshua Meier Company v. Albany Novelty Mfg. Co., 2 Cir., 236 F.2d 144. Such a review covers only the exercise of proper judicial discretion by the lower court in granting or denying the temporary relief. Deckert v. Independence Shares Corp., 311 U.S. 282; Goldammer v. Fay, 10 Cir., 326 F.2d 268; Goodpaster v. Oklahoma Gas & Electric Company, 10 Cir., 291 F.2d 276; B. W. Photo Utilities v. Republic Molding Corporation, 9 Cir., 280 F.2d 806; Shearman v. Missouri Pacific Railroad Company, 8 Cir., 250 F.2d 191; Solex Laboratories, Inc. v. Plastic Contact Lens Co., 7 Cir., 268 F.2d 637; American Federation of

Musicians v. Stein, 6 Cir., 213 F.2d 679, cert. denied, 348 U.S. 873; Tatum v. Blackstock, 5 Cir., 319 F.2d 397; Leesona Corp. v. Cotwood Mfg. Corp., Judson Mills Div., 4 Cir., 315 F.2d 538; Schering Corporation v. Sun Ray Drug Co., 3 Cir., 320 F.2d 72; Safeway Stores, Inc. v. Safeway Properties, Inc., 2 Cir., 307 F.2d 495; Celebrity, Inc. v. Trina, Inc., 1 Cir., 264 F. 2d 956; Young v. Motion Picture Association of America, Inc., D.C. Cir., 299 F.2d 119, cert. denied, 370 U.S. 922; 28 Am. Jur., Injunction, § 332, pp. 845-848; 5A C.J.S., Appeal & Error, § 1591, pp. 60-67. The merits of the case may be considered only insofar as they bear upon the question of proper judicial discretion. Shearman v. Missouri Pacific Railroad Company, supra; Holzer v. United States, 8 Cir., 244 F.2d 562; City of Des Moines v. Continental Illinois Nat. Bank & Trust Co., 8 Cir., 205 F.2d 729; Flight Engineers' Inter. Ass'n. v. American Airlines, Inc., 5 Cir., 303 F.2d 5; Young v. Motion Picture Association of America, Inc., supra.

The appellant urges that these rules are not applicable to this case and that Section 8a(6), in effect, is a mandate from the Congress compelling the courts to grant extraordinary equitable relief, in the form of a mandatory preliminary injunction, without the exercise of any judicial discretion. We do not adhere to this line of argument. To the contrary, we believe our inquiry here must go solely to the question of whether or not the court below abused its equitable discretion in refusing the premliminary relief.

It is true the inferior Federal courts are creatures of statute but, nevertheless, historically, they are possessed with the inherent equitable powers of common law courts. If they are ever striped of judicial discretion in equitable pro-

ceedings they will be relegated to the standing of mere administrative enforcement agencies. By the enactment of the enforcement provisions of the statute under consideration, we do not think the Congress intended to deprive the judiciary of any of its equitable power of discretion. A careful reading of the statute convinces us that the court below was correct in its interpretation of that statute when it said: "This contains no language which can be interpreted as a congressional mandate withdrawing from this court the power to exercise its discretion in refusing injunctive relief which it deems unfair and improper. * * * " (217 F. Supp. at 286).

The appellant places great stress upon the case of United States v. Ruzicka, 329 U.S. 287. That case, unlike our case here, was reviewing an order granting a preliminary injunction. The order was upheld but the court expressly stated: "* * * And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States for the enforcement of an order under § 8a. * * * * " (329 U.S. at 295). We do not believe that the Supreme Court in the Ruzicka case meant to, or did, withdraw from the courts their traditional and long standing power to exercise judicial discretion in equitable proceedings.

We are cognizant of the conflicting rights involved in this case. On the other side, there is the policy of the Act which must be complied with and enforced in the public interest, and, on the other side, is the protection of individual rights. From the standpoint of equity we see factual circumstances in the case that justify the denial of the motion. The lapse of time between appellees' request

for administrative relief and the entering of the court's order appealed from, without any administrative determination, may have been a compelling reason. Also, to compel the payment of substantial monthly assessments over a long period of time without appellees having their day in court certainly cannot be said to be equitable. Such a situation could work a severe financial hardship upon appellees. There are substantial questions of law and fact involved in the controversy and there is no showing, other than the bare allegations of the motion, of irreparable injury to appellant or the public. Nor is there any showing that appellee is or may become insolvent or that appellees' failure to pay the assessments will seriously effect the milk order.

We must conclude that the court below did not abuse its judicial discretion in refusing to issue the preliminary injunction.

AFFIRMED.

Appendix C.

UNITED STATES COURT OF APPEALS

Tenth Circuit

Nos. 8291 and 8292 — September Term, 1966

FRED A. BROWN and JENNIE B. BROWN, d/b/a GEM DAIRY, Appellants,

8291 vs.

UNITED STATES OF AMERICA, and ORVILLE L. FREEMAN, Secretary of Agriculture, Appellees.

UNITED STATES OF AMERICA, Appellant,

8292 vs.

FRED A. BROWN and JENNIE B. BROWN, d/b/a GEM DAIRY, Appellees.

Appeals from the United States District Court for the District of Colorado

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[Filed October 27, 1966.]

George Louis Creamer, Denver, Colorado, (Nathan H. Creamer, Denver, Colorado, with him on the brief), for Appellants Fred A. Brown, et. al.

Frederick B. Abramson, Attorney, Department of Justice, Washington, D.C., (John W. Douglas, Assistant Attorney General, Washington, D.C., and Lawrence M. Henry, U.S. Attorney, Denver, Colorado, with him on the

brief), for Appellees United States of America, and Orville L. Freeman.

Before PICKETT and HICKEY, Circuit Judges, and CHRISTENSEN, United States District Judge.

PICKETT, Circuit Judge.

On November 1, 1961, the Secretary of Agriculture, acting pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601, et seq., promulgated Milk Marketing Order No. 137 for the Eastern Colorado Marketing Area. 7 C.F.R. 1137.1, et seq. The purpose of the Order was to equalize and stabilize the price to be paid for milk produced within the area, regardless of the use of the milk by the purchasers, or "handlers." As all handlers within the terms of the Order were required to pay a minimum price for purchased milk, the Secretary, in order to prevent inequities, was authorized to provide a means for equitable adjustment of payments, whereby each handler would pay for the milk according to the use made thereof. (7 U.S.C. §608c(4). The most workable method of equalizing the price was found to be a "producers-settlement fund." A Market Administrator, designated by the Secretary, was required to determine a "blend price", taking into consideration the different uses of milk within the area. Milk sold for fluid consumption brought the highest price. A lesser value was established for the milk used in the manufacture of cottage cheese, powdered milk, butter, ice cream and other manufactured milk products. All handlers paid the milk producers the blend price for milk, regardless of its use. Those handlers whose use of milk called for a price above the fixed blend price were required to contribute to the producer-settlement fund accordingly. Those whose use

resulted in a price below the blend price were paid the difference from the fund.[1]

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[1]In an early case after the constitutionality of the statute had been upheld, (United States v. Rock Royal Co-op., 307 U.S. 533, rehearing denied 308 U.S. 631; H. P. Hood & Sons v. United States, 307 U.S. 588), Judge Magruder described the method of equalizing and stabilizing the price of milk through an order similar to the one under consideration here, as follows: "Article III of the Order sets up classifications of milk according to the use to which it is put, because such use primarily determines the market value of the milk. Class I embraces fluid milk disposed of for consumption in that form as an article of diet. Class II embraces milk disposed of for nonfluid purposes, such as the manufacture of butter or ice cream. Article IV establishes minimum prices to be paid by handlers of Class I and Class II milk, respectively. While in the net result these prices are paid by handlers for the milk that they buy and dispose of, the individual producers do not receive payment on this basis. The Order creates a market-wide pool as an equalization device under which the individual producer is paid a uniform composite price for the milk which he sells, based upon the use made of all the milk sold in the Greater Boston Marketing Area. A Market Administrator computes for each delivery period the use value of the milk sold or used by each handler, multiplying the quantity of such milk in each class by the applicable class price and adding together the two sums (Art. VII, Sec. 1). Then the Administrator combines into one grand total the respective values of the milk sold or used by each handler, and after adjustments for various differentials the adjusted total is divided by the total quantity of milk. The result is a 'blend' or uniform price which all producers are to receive for milk delivered by them during the period, regardless of the use to which any particular milk is devoted.

The blended price is less than the Class I price and more than the Class II price as fixed by Article IV of the Order. A handler who has more than the market average of Class II milk sales during a particular delivery period will have to pay to his producers at the blended price an amount greater than the total amount charged to him as the use value of the milk he has received from producers during that period. Such a handler will therefore be credited with the difference in his producer settlement account on the books of the Market Administrator and becomes entitled to receive from the Administrator an equalization payment out of the pool. On the other hand, a handler who has more than the market average of Class I fluid milk sales during the same delivery period will pay to his producers at the blended price an amount less than the total amount charged to him as the use value of the milk he has received from producers during the period. Such handler will therefore be debited with the difference in his producer settlement account, and is required by Article VIII, Section 1, of the Order to pay this amount into the pool. Omitting refinements, the debits and credits in the pool should normally balance out in each delivery period.

This market-wide equalization pool is the core of the regulatory scheme set up by Order No. 4 as amended." Green Valley Creamery v. United States, 1 Cir., 108 F.2d 342, 343-344. See, also, United States v. Ruzicka, 329 U.S. 287.

The reliance of the industry upon this fund makes prompt payments into it imperative. United States v. Ruzicka, 329 U.S. 287. The theory of the Order is that all milk produced in the area, not specifically exempt, is considered to be in a "pool" from which handlers draw for varied uses. In final settlement, the cost of milk to handlers depends upon its use. In this arrangement, the price difference according to use is the essence of the plan to stabilize prices to producers within a designated area through a uniform minimum price.

The appellants, Fred A. Brown and Jennie B. Brown, d/b/a Gem Dairy in Denver, Colorado, were distributors of milk for fluid consumption within the area, and, claiming that they were not "handlers" as defined by the Order, refused to comply therewith. The United States sought a mandatory injunction to enforce compliance with the Order. The matter was held in abeyance pending an administrative appeal to the Secretary of Agriculture from the Market Administrator's determination that Gem was a "handler", and therefore subject to the provisions of the Order. The Secretary, acting through his Judicial Officer, entered an order adverse to Gem. Gem thereupon instituted an action for review in the United States District Court for the District of Colorado, 7 U.S.C. §608 (c) (15), and the cases were consolidated for trial. Judgment was entered for the amount of delinquent payments due the stabilization fund, but injunctive relief was denied. Gem appealed from the judgment, and the United States appealed from the refusal to grant the injunctive relief prayed for. We shall dispose of both cases in one opinion.

Throughout the proceedings, Gem has maintained that it is a "producer-handler" of milk and therefore exempt

from the requirements of the Order.[2] We agree with the Secretary of Agriculture and the trial court that this contention is not sustained by the record. Prior to notice that Milk Marketing Order 137 would be proposed, Gem was purchasing all of its milk from six farmer-producers in the Denver area for the purpose of processing and delivering in fluid form to its customers. After the Order had been proposed and a hearing held thereon, Gem entered into contracts with all of these producers, whereby, for the sum of $15.00 per animal, a 1/10th interest was acquired in all of the dairy cattle from which the milk was produced. The contracts also provided that Gem was the owner of all milk produced from these cows, for which it was required to pay the current milk price. With few exceptions, the current price was the "blend price" as established by the Market Administrator. Gem assumed no control over the management or care of the dairy cows, and the $15.00 payment was to be returned if any of the animals were sold, regardless of the sale price. Either party was free to discontinue this arrangement by giving 30 days notice, in which event the $15.00 per head was to be returned to Gem. It is clear that Gem was not operating the dairy farms in question, nor was the care and management of the dairy animals part of its enterprise. The contracts brought about no change whatsoever in Gem's method of doing business, and excepting the $15.00 pay-

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[2]The Order defines "producer-handler" as follows:

"'Producer-handler' means any person who operates a dairy farm and a milk processing plant which distributes fluid milk products on routes in the marketing area and who receives no fluid milk products during the month from dairy farmers or any other source except by transfer from a pool plant. Such person must provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk products (excluding transfers from pool plants) and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person." 7 C.F.R. §1137.11.

ment, no additional obligations were incurred.[3] As between the parties, the district court decision does not affect the validity of these contracts; it merely holds that they are not effective to classify Gem a "producer-handler" as defined in the Order.

Gem argues that it was denied constitutional due process when the Market Administrator determined without a hearing that it was a "handler" within the meaning of the Order. The Act provides, however, that a handler is entitled to a hearing before the Secretary after the Market Administrator's decision is made. It is sufficient to satisfy the demands of due process if a hearing is provided for before a final order becomes effective. Lichter v. United States, 334 U.S. 742; Opp Cotton Mills v. Administrator, 312 U.S. 126. In United States v. Ruzicka, supra, the court refers to the safeguards provided by op-

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[3]The language used by the district court appears appropriate when it referred to the contract as follows:

"The contracts which have been mentioned seem at best to be a transparent effort to avoid the effect of the milk order, and it cannot be said that it was as a matter of law successful. The payment by the plaintiffs to the 'sellers' was more like a deposit to ensure their milk supply than the payment of a price for a percentage interest. This is particularly true in view of the fact that the $15.00 amount was always returnable in the event of sale or termination of the contract. There was much other evidence adduced at the hearing which renders questionable the plaintiffs' contention that they are owners of the cows, but this need not be specifically mentioned since the evidence to support the finding and conclusions of the judicial officer is substantial.

This case is somewhat similar to the fact situation which appeared in United States v. Elm Spring Farm, (D.C. Mass., 1941), 38 F. Supp. 508, 127 F.2d 920. There a corporate 'handler' of milk formed a cooperative association which took title to the dairy cattle of the producers giving mortgages and stocks. However, there was no substantial change in the manner of conducting the business of performance of the function as it existed prior to the alleged transfer. The court refused to recognize that the cooperative was a producer, saying:

'Where the handler's business remains the same, where its method of doing business remains the same, and where the distribution of milk handled by it remains the same, to effect a transition from a handler to a producer requires something more than the passage of a few legal papers and the redesignation of the persons from whom they procure the milk.' 38 F.Supp. at 511."

portunity for administrative and judicial consideration of a handler's grievances. We are satisfied that there was no lack of due process in the classification of Gem as a handler.

The administrative hearings were held before an Examiner, and the final order made by a Judicial Officer of the Department of Agriculture. Gem contends that the determination is void because it was not made by the Secretary, and that the powers of the Secretary could not properly be delegated to the Judicial Officer. No contention is made that the Secretary of Agriculture did not designate the Judicial Officer to act in this case by appropriate order. See, 10 F.R. 13769; 27 F.R. 8288. Rather, it is argued that only the Secretary has the power to review objections to specific rulings in proceedings such as under consideration here. The provisions of 5 U.S.C. §516a, b, and c, however, authorize the Secretary of Agriculture to delegate to the Judicial Officer authority to perform those regulatory functions which were undertaken in this proceeding. See, Central Fruit & Vegetable Co. v. Crane, 9 Cir., 198 F.2d 808, cert. denied 344 U.S. 921; Denver Stock Yard v. Livestock Ass'n, 356 U.S. 282; Ideal Farms, Inc. v. Benson, 3 Cir., 288 F2d 608, cert. denied 372 U.S. 965; Wilson & Co. v. Benson, 7 Cir., 286 F.2d 891.

In the administrative proceedings, it was found that Gem was delinquent in its payments into the stabilization fund in the amount of $13,066.39 as of the date of the hearing. The trial court entered judgment against Gem for that amount. It is urged that the judgment is void because the court relied entirely upon the record in the administrative proceedings and that there was no evidence in the record from which the amount of the judgment

could be computed. We think the evidence in the administrative proceedings and before the trial court was sufficient to sustain the finding as to the amount due. Although Gem refused to make payments into the stabilization fund as required by the Order, it did submit to the Market Administrator the required reports which showed the amount of milk handled by it and the uses for which it was sold. Gem was furnished monthly bulletins as to the blend price to be paid for the milk and the value of the milk received by it. The determination of Gem's obligation to the stabilization fund was a matter of mathematical computation. At the administrative hearing, the Market Administrator fully explained the manner by which the amounts due from Gem were determined. In addition, when the matter came before the district court, the Market Administrator, at the request of the court, furnished an affidavit which explained in detail how these charges were computed. When Gem objected to the procedure for the determination of the amount due, the court suggested that the parties confer for the purpose of satisfying Gem as to how the Administrator had computed the amount of the delinquency. At a later hearing, the court observed:

"The Court: So, my disposition would be to direct the entry of judgment for all those contributions that had accumulated up to that point, it appearing that the method employed is in accordance with the regulations, and that the calculations are not improper.

Mr. Creamer has very candidly stated to the Court that the accountant has not found any impropriety in these calculations. This I appreciate. In view of that, it seems to me that we have found the truth to the extent that we are going to."

We perceive no judicial error in the determination of the amount due.

As to the right of the Secretary to a mandatory injunction requiring compliance with the Order, we think that the district court, upon finding that Gem was in continuous violation of the Order, was required to grant the relief sought. 7 U.S.C. §608a(6) provides:

"The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

The Act authorizes a handler to challenge, in administrative proceedings, an order which is "not in accordance with the law." 7 U.S.C. §608c(15) (a). The jurisdiction of district courts are limited to a determination of whether the ruling of the Secretary in the administrative proceedings is "in accordance with law." 7 U.S.C. §608c(15) (B). If the order is found to be in accordance with law, the district court is "vested with jurisdiction specifically to enforce." As said in United States v. Ruzicka, supra, at 292:

"Sections 8a(6) and 8c(15) thus form a complementary procedural scheme. Contrariwise, it would make for disharmony to extrapolate from these provisions of the statute the right to consider independently, in a proceeding by the Government for the enforcement of the Secretary's order, questions for which Congress explicitly furnished the handler an expert forum for contest with ultimate review by a district court.

The situation before us indicates how disruptive it

would be to allow issues that may properly come before a district court in a proceeding under §8c(15) to be open for independent adjudication in a suit for enforcement under §8a(6). After a presumably careful study by those technically equipped, a program was devised for the dairy farmers in one of the large areas of the country. The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program."

The success of the plan of the Order depends upon the prompt compliance of those subject to its provisions, including prompt payment of the financial obligations. Gem has never made any payments into the stabilization fund, and, without enforcement relief, the Secretary can only sue periodically to recover delinquent payments, thereby disrupting the entire plan. We think the statute clearly contemplates that the Secretary is entitled to an injunction commanding compliance with the Order by one who has been in continuous violation.[4] United States v. Turner Dairy Co., 7 Cir., 162 F.2d 425, cert. denied 332 U.S. 836; United States v. Yadkin Valley Dairy Cooperative, Inc., U.S.D.C., N.C., M.D., 209 F.Supp. 634, aff'd 315 F.2d 867.

The judgment is AFFIRMED, except the denial of injunctive relief. The case is REMANDED with instructions to grant the injunction prayed for.

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[4]The case is no longer in the situation as when it was previously before this Court. Gem has since been found to be in continuous violation of the Order. See, United States v. Brown, 10 Cir., 331 F.2d 362.

Appendix D-1.

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et, seq.*, provides in pertinent part as follows:

7 U.S.C. 601

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

It is declared to be the policy of Congress — (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

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7 U.S.C. 608a (6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation; or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

7 U.S.C. 608c (1)

The Secretary of Agriculture shall, subject to the

provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c (2)

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk * * *.

7 U.S.C. 608c (3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

7 U.S.C. 608c (4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced

at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

7 U.S.C. 608c (5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any classification thereof, is made to such handlers:

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provisions is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such

representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered:

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purpose set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer

and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) or assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers:

Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

7 U.S.C. 608c (7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form (such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610 (g) of this title, unless such person receives compensation for his personal services from funds of the

United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c (8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided,* That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c (9)

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement

relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines;

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c (11) (B)

Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

7 U.S.C. 608c (12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c (13) (A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural

commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

7 U.S.C. 608c (15) (A)

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant

to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in preceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. 608c (18)

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purpose of such agreement, order, or amendment, be adjusted to reflect the pride of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates,

he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. 608c (19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

Appendix D-2.

Federal Milk Marketing Order No. 137 Regulating Handling of Milk in the Eastern Colorado Marketing Area, 26 F.R. 9122, as amended, 7 C.F.R. 1137.1, *et seq.*, provides in pertinent part as follows:

§1137.7 *Pool plant.*

"Pool plant" means any plant meeting the conditions of paragraph (a) or (b) of this section except the plant of a producer-handler or the plant of a handler exempt pursuant to § 1137.61.

(a) Any plant, hereinafter referred to as a "distributing pool plant", in which during the month fluid milk products are processed or packaged and from which (1) an amount equal to 50 percent or more of the total receipts of Grade A milk (except receipts from distributing pool plants) is disposed of as fluid milk products on routes, and (2) 10 percent or more of such receipts, or 12,000 pounds per day, whichever is less, are disposed of on routes in the marketing area; and

(b) Any plant, hereinafter referred to as a "supply pool plant" from which during the month 50 percent of its dairy farm supply of Grade A milk is moved to distributing pool plant(s). Any supply plant which has qualified as a pool plant in each of the months of September through February (under either this part or under Part 1135 of this chapter, regulating the handling of milk in Colorado Springs-Pueblo marketing area) shall be a pool plant in each of the following months of March through August unless written request for non-pool status for any such month(s) is furnished in advance to the market administrator. A plant withdrawn from supply pool plant status may not be reinstated for any subsequent month

of March through August unless it fulfills the shipping requirements of this paragraph for such month.

§1137.8 *Nonpool plant.*

"Nonpool plant" means any milk receiving, manufacturing or processing plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) "Other order plant" means a plant that is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act.

(b) "Producer-handler plant" means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) "Partially regulated distributing plant" means a nonpool plant that is neither an other order plant nor a producer-handler plant, from which fluid milk products labeled Grade A in consumer-type packages or dispenser units are distributed on routes in the marketing area during the month.

(d) "Unregulated supply plant" means a nonpool plant which is neither an other order plant nor a producer-handler plant and from which Grade A fluid milk products are moved during the month to a pool plant qualified pursuant to § 1137.7.

§1137.9 *Handler.*

"Handler" means:

(a) Any person in his capacity as the operator of one or more pool plants;

(b) Any person who operates a partially regulated distributing plant;

(c) A cooperative association with respect to the milk of its member producers which is diverted from a pool plant to a nonpool plant for the account of such cooperative association;

(d) A cooperative association with respect to the milk of its member producers which is received from the farm for delivery to the pool plant of another handler in a tank truck owned and operated by or under contract to such cooperative association, if the cooperative association notifies the market administrator and the operator of the pool plant to whom the milk is delivered, in writing prior to the first day of the month in which the milk is delivered, that it elects to be the handler for all such milk. Such milk shall be deemed to have been received by such cooperative association at the location of the pool plant to which delivered; or

(e) A producer-handler, or any person who operates an other order plant described in § 1137.61.

§1137.11 *Producer-handler.*

"Producer-handler" means any person who operates a dairy farm and a milk processing plant which distributes fluid milk products on routes in the marketing area and who receives no fluid milk products during the month from dairy farmers or any other source except by transfer from a pool plant. Such person must provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk products (excluding transfers from pool plants) and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person.

§1137.41. *Classes of utilization.*

Subject to the conditions set forth in §§ 1137.42 through 1137.46, the classes of utilization shall be as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat.

(1) Disposed of in the form of a fluid milk product except:

(i) Any products fortified with added nonfat milk solids shall be Class I in an amount equal only to the weight of an equal volume of milk, skim milk, or cream of the same butterfat content; and

(ii) As classified pursuant to paragraph (c) (2), (3) and (5) of this section;

(2) In inventory of fluid milk products in packaged form on hand at the end of the month; or

(3) Not specifically accounted for as Class II or Class III.

(b) *Class III milk.* Class II milk shall be all skim milk and butterfat used to produce cottage cheese except as classified pursuant to paragraph (c) (2) and (3) of this section.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Used to produce any product other than a fluid milk product or a Class II product;

(2) In fluid milk products or cottage cheese disposed of in bulk for livestock feed;

(3) In fluid milk products or cottage cheese which are

dumped after prior notification to and opportunity for verification by the market administrator;

(4) Contained in any fortified fluid milk product in excess of the pounds classified as Class I milk pursuant to paragraph (a) (1) (i) of this section;

(5) Disposed of in fluid milk products in 2-gallon containers or larger (other than those designed for use as fluid milk dispensers or in fluid milk dispensing machines) to any commercial food processing establishment, which does not dispose of fluid milk products for fluid consumption, or which does not use fluid milk products in any other type of food prepared for consumption on the premises;

(6) In inventory of bulk fluid milk products on hand at the end of the month;

(7) In shrinkage at each pool plant allocated pursuant to § 1137.42(b) (1), not to exceed the following:

(i) Two percent of receipts of producer milk described in § 1137.12(a); plus

(ii) 1.5 percent of receipts from a cooperative association in its capacity as a handler pursuant to § 1137.9 (d), except that if the handler operating the pool plant filed with the market administrator notice that he is purchasing such milk on the basis of farm weights determined by farm bulk tank calibrations and butterfat tests determined from farm bulk tank samples, the applicable percentage shall be two percent; plus

(iii) 1.5 percent of receipts in bulk tank lots from other pool plants; plus

(iv) 1.5 percent of receipts of fluid milk products in bulk tank lots from an other order plant, exclusive of the

quantity for which Class III utilization was requested by the operator of such plant and the handler; plus

(v) 1.5 percent of receipts of fluid milk products in bulk tank lots from unregulated supply plants, exclusive of the quantity for which Class III utilization was requested by the handler; less

(vi) 1.5 percent of disposition in bulk tank lots to other milk plants either by transfers or diversions;

(8) In shrinkage allocated pursuant to § 1137.42(b)(2); and

(9) In shrinkage resulting from milk for which a cooperative association is the handler pursuant to § 1137.9(c) or (d) not being delivered to pool plants and nonpool plants, but not in excess of one-half percent of such receipts, exclusive of those for which farm weights and tests are used as the basis of receipt at the plant to which delivered.

§1137.50 *Basic formula price.*

The basic formula price shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Wisconsin and Minnesota, as reported by the Department for the month, adjusted to a 3.5 percent basis by a butterfat differential rounded to the nearest one-tenth cent computed at 0.12 times the simple average of the daily wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk creamery butter per pound at Chicago, as reported by the Department for the month. The basic formula price shall be rounded to the nearest full cent.

§1137.51 *Class prices.*

Subject to the provisions of §§ 1137.52 and 1137.53,

the class prices per hundredweight for the month shall be as follows:

(a) *Class I milk.* The Class I price shall be the basic formula for the preceding month plus $2.10, plus or minus a supply-demand adjustment calculated for each month as follows:

(1) For each month calculate a utilization ratio as follows:

(i) Calculate a utilization ratio for the 12-month period ending with the second preceding month by dividing the total receipts of producer milk by the total gross volume of Class I milk (excluding interhandler transfers and any inter-market transfers that would result in the same milk being accounted for the second time as Class I milk) under this part and under Part 1134 of this chapter regulating the handling of milk in the Western Colorado marketing area, and multiply by 100;

(ii) Add or subtract, respectively, any amount by which the percentage computed pursuant to subdivision (i) of this subparagraph is greater or less than a comparable utilization percentage calculated using the 12-montt period ending with the fourth preceding month; and

(iii) The resultant figure rounded to the nearest whole percentage shall be known as the utilization ratio.

(2) For each percentage by which the utilization ratio calculated for the month pursuant to subparagraph (1) of this paragraph exceeds 136, subtract from, or for each percentage by which it is less than 130, add to, the Class I price, 2 cents:

Provided, That any additions or subtractions shall be limited to 50 cents per hundredweight.

(b) *Class II milk.* The Class II price shall be the basic formula price for the month plus 15 cents; and

(c) *Class III milk.* The Class III price shall be the basic formula price for the month.

§1137.60 *Producer-handler.*

Sections 1137.40 through 1137.46, 1137.50 through 1137.54, 1137.70 through 1137.72, and 1137.80 through 1137.88, shall not apply to a producer-handler.

§1137.70 Computation of the net pool obligation *of each pool handler.*

The net pool obligation of each pool handler and of each cooperative association handler pursuant to § 1137.9 (c) and (d) during each month shall be a sum of money computed by the market administrator as follows:

(a) Multiply the quantity of producer milk in each class, as computed pursuant to § 1137.46(c), by the applicable class prices (adjusted pursuant to §§ 1137.52 and 1137.53);

(b) Add the amount obtained from multiplying the pounds of overage deducted from each class pursuant to § 1137.46(a) (11) and the corresponding step of § 1137.46 (b), by the applicable class prices;

(c) Add the amounts computed under sub-paragraphs (1), (2), and (3) of this paragraph:

(1) Multiply the difference between the appropriate Class III price for the preceding month and the appropriate Class I price for the current month by the hundredweight of skim milk and butterfat substracted from Class I pursuant to § 1137.46(a) (6) and the corresponding step of § 1137.46(b), for the current month;

(2) Multiply the difference between the appropriate Class III price for the preceding month and the appropriate Class II price for the current month by the hundredweight of skim milk and butterfat substracted from Class II milk pursuant to § 1137.46(a) (6) and the corresponding step of § 1137.46(b), for the current month, or the hundredweight of skim milk and butterfat remaining in Class III milk after the calculation pursuant to § 1137.46 (a) (9) and the corresponding step of § 1137.46(b), for the preceding month, less the hundredweight used in the computation pursuant to subparagraph (1) of this paragraph, whichever is less; and

(3) Multiply the difference between the appropriate Class I price for the preceding month and the appropriate Class I price for the current month by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1137.46(a) (3) and the corresponding step of § 1137.46(b). If the Class I price for the current month is less than the Class I price for the preceding month the result shall be a minus amount.

(d) Add an amount equal to the difference between the value at the Class I price applicable to the pool plant and the value at the Class III price, with respect to skim milk and butterfat in other source milk substracted from Class I pursuant to §1137.46(a) (4) and the corresponding step of § 1137.46(b); and

(e) Add an amount equal to the value at the Class I price, adjusted for location of the nearest nonpool plant(s) from which an equivalent weight was received, with respect to skim milk and butterfat subtracted from Class I pursuant to § 1137.46(a) (8) and the corresponding step of § 1137.46(b).

§1137.71 *Computation of the uniform price.*

For each month market administrator shall compute the uniform price per hundredweight of milk received from producers as follows:

(a) Combine into one total the values computed pursuant to § 1137.70 for all handlers who filed the reports prescribed by § 1137.30 for the month and who made the payments pursuant to §§ 1137.80 and 1137.84 for the preceding month;

(b) Add an amount equal to the total value of the location differentials computed pursuant to § 1137.81;

(c) Subtract, if the average butterfat content of the milk specified in paragraph (e) of this section is more than 3.5 percent, or add, if such butterfat content is less than 3.5 percent, an amount computed by multiplying the amount by which the average butterfat content of such milk varies from 3.5 percent by the butterfat differential computed pursuant to § 1137.82 and multiplying the result by the total hundredweight of such milk;

(d) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1137.70(e); and

(f) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the "uniform price" per hundredweight of producer milk of 3.5 per-

cent butterfat content delivered to plants at which no location adjustment is applicable.

§1137.72 *Notification of handlers.*

On or before the 12th day after the end of each month, the market administrator shall mail to each handler, at his last known address, a statement showing:

(a) The amount and value of his producer milk in each class and the total thereof;

(b) The uniform price computed pursuant to § 1137.71 and the producer location and butterfat differentials computed pursuant to §§ 1137.81 and 1137.82; and

(c) the amount to be paid by such handler pursuant to §§ 1137.84, 1137.86, 1137.87, and 1137.88 and the amount due such handler pursuant to §1137.85.

§1137.80 *Payment to producers.*

Except as provided in paragraphs (b) and (c) of this section, each handler except a cooperative association shall make payment as specified in paragraph (a) of this section to each producer from whom milk is received:

(a) (1) On or before the last day of the month, to each producer who had not discontinued shipping milk to such handler before the 18th day of the month, a partial payment with respect to milk received during the first 15 days of the month at the Class III price for the preceding month;

(2) On or before the 16th day after the end of the each month, for milk received during such month, an amount computed at not less than the uniform price per hundredweight pursuant to § 1137.71, subject to the butterfat differential computed pursuant to § 1137.82 and location adjustment computed pursuant to § 1137.81, plus

or minus adjustments for errors made in previous payments to such producers and less:

(i) Payments made pursuant to subparagraph (1) of this paragraph;

(ii) Marketing service deductions pursuant to § 1137.87; and

(iii) Proper deductions authorized in writing by such producer: *Provided,* That if by such date such handler has not received full payment for such delivery period pursuant to § 1137.85 he may reduce his total payment to all producers uniformly by not more than the amount of reduction in payment from the market administrator; the handler shall, however, complete such payments not later than the date for making such payments pursuant to this paragraph next following receipt of the balance from the market administrator;

(b) (1) Upon receipt of a written request from a cooperative association which the market administrator determines is authorized by its members to collect payment for their milk and receipt of a written promise to reimburse the handler the amount of any actual loss incurred by him because of any improper claim on the part of the cooperative association each handler shall pay to the cooperative association on or before the second day prior to the date of payment to producers in lieu of payments pursuant to paragraph (a) of this section an amount equal to the sum of the individual payments otherwise payable to such producers. The foregoing payment shall be made with respect to milk of each producer whom the cooperative association certifies is a member effective on and after the first day of the calendar month next following receipt of such certification through the

last day of the month next preceding receipt of notice from the cooperative association of a termination of membership or until the original request is rescinded in writing by the cooperative association; and

(2) A copy of each such request, promise to reimburse and certified list of members shall be filed simultaneously with the market administrator by the cooperative association and shall be subject to verification at his discretion through audit of the records of the cooperative association pertaining thereto. Exceptions, if any, to the accuracy of such certification by a producer claimed to be a member, or by a handler, shall be made by written notice to the market administrator and shall be subject to his determination;

(c) For milk received from a pool plant operated by a cooperative association or by bulk tank delivery pursuant to § 1137.9(d), each handler shall on or before the second day prior to the date payments are due individual producers, pay such cooperative association for such milk as follows:

(1) A partial payment for milk received during the first 15 days of the month at not less than the Class III price for the preceding month; and

(2) A final settlement equal to the value of such milk at the uniform price, adjusted by the applicable differentials pursuant to §§ 1137.81 and 1137.82, less payment made pursuant to subparagraph (1) of this paragraph.

(d) In making the payments to producers pursuant to paragraphs (a) (2) and (b) of this section, each handler shall furnish each producer or cooperative association from whom he has received milk with a supporting statement which shall show for each month:

(1) The month and the identity of the handler and of the producer;

(2) The total pounds and the average butterfat content of milk received from such producer;

(3) The minimum rate or rates at which payment to such producer is required pursuant to this part;

(4) The rate which is used in making the payment if such rate is other than the applicable minimum rate;

(5) The amount or the rate per hundredweight and nature of each deduction claimed by the handler; and

(6) The net amount of payment to such producer.

§1137.83 *Producer-settlement fund.*

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 1137.62, 1137.84, and 1137.86 and out of which he shall make all payments pursuant to §§ 1137.85 and 1137.86: *Provided,* That any payments due to any handler shall be offset by any payments due from such handler.

§1137.84 *Payments to the producer-settlement fund.*

On or before the 14th day after the end of the month each handler shall pay to the market administrator the amount, if any, by which the total amount specified in paragraph (a) of this section exceed the amounts specified in paragraph (b) of this section:

(a) The sum of:

(1) The net pool obligation computed pursuant to § 1137.70 for such handler; and

(2) In the case of a cooperative association which is a handler the minimum amounts due from other handlers pursuant to §1137.80(c).

(b) The sum of:

(1) The value of milk received by such handler from producers at the uniform price adjusted by applicable differentials pursuant to §§ 1137.81 and 1137.82;

(2) The amount to be paid to cooperative associations pursuant to § 1137.80 (c); and

(3) The value at the uniform price(s) applicable at the location of the plant(s) from which received (not to be less than the value at the Class III price) with respect to other source milk for which a value is computed pursuant to § 1137.70(e).

§1137.85 *Payments out of the producer-settlement fund.*

On or before the 15th day after the end of each month the market administrator shall pay to each handler the amount (for each pool plant, if applicable), if any, by which the amount computed pursuant to § 1137.84(b) exceeds the amount computed pursuant to § 1137.84(a). If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the funds are available.

§1137.86 *Adjustment of accounts.*

(a) Whenever audit by the market administrator of any handler's reports, books, records, or accounts or other verification discloses errors resulting in moneys due a producer, a cooperative association, or the market administrator from such handler or due such handler from

the market administrator, the market administrator shall promptly notify such handler of any amount so due and payment thereof shall be made on or before the next date for making payments as set forth in the provisions under which such error occurred.

(b) Any unpaid obligation of a handler pursuant to § 1137.84 or paragraph (a) of this section relative to payments to the producer-settlement fund shall be increased one-half of 1 percent on the first day of the month next following the due date of such obligation and on the first day of each month thereafter until such obligation is paid.

The Rules of Practice of the Department of Agriculture Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders, 7 C.F.R. 900.50 *et seq.*, provide in pertinent part as follows:

§900.70 *Applications for interim relief.*

(a) *Filing the application.* A person who has filed a petition pursuant to § 900.52 may by separate application filed with the hearing clerk apply to the Secretary or an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

(b) *Contents of the application.* The application shall contain a statement of the facts upon which the relief is requested, including any facts showing irreparable injury. The application must be signed and sworn to by the petitioner and any facts alleged therein which are not within his personal knowledge shall be supported by affidavits of a person or persons having personal knowledge of such facts or by proper documentary evidence thereof.

(c) *Answer to application.* Immediately upon receipt of the application, the hearing clerk shall transmit a copy thereof, together with all supporting papers, to the Administrator, who shall, within 20 days, or such other time fixed by the Secretary, after the filing of the application file an answer thereto with the hearing clerk.

(d) *Contents of answer.* The answer shall contain a statement of the objections, if any, of the Administrator to the application for interim relief, and may be supported by affidavits and documentary evidence.

(e) *Transmittal to Secretary.* Upon receiving the answer of the Administrator or upon the expiration of the time for filing the answer, the hearing clerk shall transmit to the Secretary for his decision all papers filed in connection with the application.

(f) *Hearing and oral argument.* The Secretary may, in his discretion, permit oral argument or the taking of testimony in connection with such application. However, unless written request therefor is filed with the hearing clerk prior to the transmittal of the papers to the Secretary, the parties shall be deemed to have waived oral argument and the taking of testimony.

(g) *Decision by Secretary.* The Secretary may grant or deny the application. Any action taken by the Secretary shall be in the form of an order filed with the hearing clerk and shall contain a brief statement of the reasons for the action taken. The hearing clerk shall cause copies of the order to be served upon the parties.